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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 553

FRANK ANTHONY PUGLIANO,
PETITIONER,

v.

UNITED STATES OF AMERICA

WILLIAM CARRANZA,
PETITIONER,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Frank Anthony Pugliano and William Carranza, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the

First Circuit, entered in the above-entitled case July 23, 1965.

Citations to Opinions Below

The opinion of the Court of Appeals for the First Circuit is not as yet reported; it is reproduced in the appendix to this petition. Rehearing was denied without opinion on August 12, 1965 (Consolidated record-appendix to brief for appellants, p. 180).

Jurisdiction

The judgment of the court below was entered on July 23, 1965, and the judgment denying rehearing was entered on August 12, 1965. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Was there sufficient evidence to support judgments of conviction of conspiracy to receive and possess goods stolen in interstate commerce?
2. Was there sufficient evidence to support a conviction for possessing goods stolen in interstate commerce?
3. Did the trial court err in giving the jury a "dynamite" instruction?
4. Did the trial court err in giving the jury a "dynamite" instruction without at the same time instructing said jury that the government had the burden of proof?
5. Were the petitioners entitled to a new trial because the trial court remarked, within the hearing of the jury, that there was sufficient evidence on counts one and two of the indictment to "hang a king"?

Statutes Involved

TITLE 18, UNITED STATES CODE, §371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

TITLE 18, UNITED STATES CODE, §659. *Interstate or foreign baggage, express or freight; state prosecutions.*

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to con-

vert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by an fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen—

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character

of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. June 25, 1948, c. 645, 62 Stat. 729, amended May 24, 1949, c. 139, § 13, 63 Stat. 91.

Statement of the Case

On July 8, 1964 an indictment in three counts was returned against the two appellants in the United States District Court for the District of Massachusetts.

Count One of this indictment alleged that these appellants had conspired in violation of Title 18 U. S. Code Sec. 371 with William James B'Shara and Robert Joseph Suse, both named as co-conspirators, but not as defendants herein, and "with divers other persons whose names are to the Grand Jury unknown, to commit an offense against the United States, that is, to receive and have in their possession goods and chattels of a value in excess of $5000.00, that is, one hundred fifty (150) cartons of William Carter Company cotton underwear goods, and to transport the said goods from Chicopee, Commonwealth of Massachusetts, to New York City, State of New York, knowing the said goods to have been stolen, and the said chattels and goods having been stolen from Akers Motor Lines, Inc. depot at Boston, Massachusetts, while the said chattels were moving as, were a part of, and constituted an interstate shipment of freight and express from the William Carter Company, Senatobia, State of Mississippi, to the William Carter Company, Needham, Commonwealth of Massachusetts, in violation of Title 18, United States Code, sections 659 and 2314."

Four overt acts allegedly committed in furtherance of the conspiracy were set out. The period of the conspiracy was alleged to have been from on or about September 28, 1963 up to and including December 9, 1963.

Count Two of the indictment charged appellants with knowingly and wilfully having in their possession at Agawam and at Chicopee, Massachusetts, the same goods described in Count One, from on or about September 30, 1963 to on or about December 6, 1963, knowing said goods to have been stolen; all in violation of Title 18, United States Code, section 659.

Count Three, subsequently dismissed by the district court for lack of evidence to support it, charged the appellants with transporting the goods referred to in Count One and Count Two from Chicopee, Massachusetts, to New York City, New York, on or about December 6, 1963, knowing the same to have been stolen, all in violation of Title 18, United States Code, section 2314.

Each appellant pleaded not guilty to each count of the indictment when arraigned on September 10, 1964, and was given twenty (20) days within which to file special pleas and motions.

A motion timely filed on behalf of both appellants for a Bill of Particulars was denied in toto after hearing by the district court on November 16, 1963.

Appellants were tried by a jury beginning January 5, 1965 and convicted on Counts One and Two on January 8, 1965, the jury having left the courtroom to begin their deliberations at 10:55 A.M. on January 7, 1965 (R-147), and returned to the Clerk a sealed verdict at approximately 8:55 P.M. on the same day, which verdict was opened in open court on the morning of January 8, 1965.

On January 15, 1965 each appellant duly filed a motion for judgment of acquittal notwithstanding the verdict of the jury on each count and a motion for a new trial on

certain grounds set forth in each motion. All motions were summarily denied by the district court after hearing on January 25, 1965 and the appellants were sentenced on that date.

Judgments of conviction and commitment of each appellant on each of the first two Counts in the Indictment were entered on January 29, 1965. Judgments of acquittal of both appellants on Count Three were entered on January 30, 1965.

Statement of the Facts

On September 25, 1963 Beard Motor Lines received from William Carter Company at Senatobia, Mississippi, 150 cartons (cases listing from C2813 through C2962) finished cotton goods and 1 box machine heads consigned to the William Carter Company, Needham Heights, Massachusetts with delivery carrier Akers, Truck vehicle V 277, Trans Van Seal 12930 (Exhibit 1). A copy of the bill of lading covering this shipment was forwarded to the consignee and apparently received by it (R 15-16) in some manner.

On Sunday, September 29, 1963, one Martel, Terminal Manager of Akers Motor Lines, Inc. terminal in South Boston, Massachusetts, arrived on the terminal premises sometime between 9:30 A.M. and 10 A.M. (R 38). He stated that it was his practice to "check on the bills on the trucks that have already come in over the weekend. They drop their northbound trailers, leave their papers, pick up a southbound trailer with the envelope which indicates which trailer they took south . . . . The drivers come in and we have a bunkroom where we leave the papers, the southbound papers. The driver in turn comes in with his northbound papers, leaves them and picks up the southbound papers which are taken from the bunkhouse to Charlotte, North Carolina (R 28)." When asked if he had examined

a copy of Government's Exhibit 1 he stated, "Yes, sir, we have a freight bill that would cover the movement of this particular load" and that he had examined such a document (R 28). He further testified that the first time he checked on the presence of the load represented by the bill of lading (Government's Exhibit 1) was on Tuesday, October first when he was notified by a driver who was assigned to hook onto the trailer that the trailer was not then there. He said he was looking for a Georgia Highway number 277 trailer. He presented a copy of a freight bill which he stated covered the load in question (R 31). On cross examination he stated that the freight bill was sent to William Carter, Needham Heights (R 31) which purported to show that the shipment in question "came from Senatobia, Mississippi, to Needham Heights (R 32). He testified, "The indication is that they did come in to Boston, the papers were left for the southbound load and were not there Monday morning so that means those drivers, if they couldn't find a load, they would immediately call someone in supervision, which would be me, and say that particular load is missing. We know the truck came in with the trailer and left with another trailer." After objection by defense counsel with a motion to strike the above, the court and witness carried on the following colloquy: (R 33-34)

> "The Court. No. The trailer came in with these goods in from Atlanta driven by the agent of Akers and came into those premises and then, what, disappeared, the goods on the truck?"
>
> "The Witness. The trailer."
>
> "The Court. Where did it go, do you know? Have you any record as to where it went?"
>
> "The Witness. When we sent the driver out to take a load to William Carter the trailer was not in the parking lot."

"The Court. You don't know where it disappeared."

"The Witness. No, sir."

"The Court. I thought somebody took it from over there but that isn't so. When that trailer with those goods, and so forth, in accordance with the documents was supposed to land at your place in South Boston, it had never landed there, and it had disappeared; is that right?"

"The Witness. According to our records."

. . . . . .

. . . . ."The Court. To sum up what you do know, these goods were shipped from Mississippi originally and disappeared?"

"The Witness. Yes, sir."

"The Court. Whether on your premises or off, you don't know. Have I got that right?"

"The witness. To the best of my knowledge it was on the lot."

"The Court. Leave it that way."

On Recross Examination the witness was asked, "You don't know, sir, of your knowledge whether or not that truck ever got to your lot, do you?" "A. Yes, sir." "XQ. Of your own knowledge?" "A. No, sir."

"The Court. He didn't see it drive in."

"Mr. Jones. That's right."

"XQ. You never saw it on the premises—did you ever see it on the premises."

"The Court. Don't let him make any speech. You can always qualify an answer."

"A. Can I qualify? We have 35 trailers quartered in Boston without any power. I don't see five of the trailers in a week at a time. All I go by is the papers left by the drivers."

"The Court. And one is missing."

"The Witness. That's right."

"XQ. All you know is that on Tuesday a trailer you thought came in on Saturday night or Sunday was missing?"

"A. I won't say I thought. I said I knew it came in."

"XQ. You didn't see it come in?" "A. No, sir."

One Manuel A. Schipillite who was on duty at the Akers terminal on the morning of September 29, 1963, that is, he went to work at midnight September 28, 1963, and whose duty it was to get waybills from the drivers who come in to the terminal and to give them another set of bills, was unable to say just how many bills he picked up on that night and did not testify as to any bills regarding the shipment in question (R 36).

On Sunday morning September 29, 1963, at about 4:30 A.M. one Carlo Genatossio saw a truck and trailer followed by two cars and another truck pass his home on Nebraska Street, Worcester, Massachusetts. The cab of the truck was red and the trailer it was pulling had "Georgia Express" printed on it. He later saw the trailer parked at the railroad bridge on Putnam Lane in the vicinity of his house. (R 26-27)

On October 1, 1963, a trailer, a stainless steel box, with the markings "Dependable Motor Express Service, Georgia Highway Express, Inc. with the numbers V-277 was examined on Putnam Lane in Worcester, Massachusetts, by an investigator for the Worcester Police Department. It bore a Georgia registration plate 5 T214 (R 37-38). The witness was not asked, and he did not testify whether or not the trailer contained any William H. Carter Company goods at the time he inspected it. (R 37-38)

On December 11, 1963, FBI Agent Kirtley, at a place directly behind 320 Paterson Park Road, East Rutherford,

New Jersey, "found 96 cartons containing cotton merchandise bearing the name Carter." (R 22-23) One of the cartons bore the legend C2912 "outside the carton on a small tag" (R 23) which carton he identified as Exhibit 4 for identification which subsequently was admitted as Exhibit 4 over appellants' objection.

On December 18, 1963, FBI Agent Hassel found certain tags on the floor of a warehouse of John Lyman Company in Chicopee, Massachusetts. (Exhibit 2) (R 67-68). On the same date Agent Brady found certain tags (Exhibit 3) on the floor of a garage in the rear of the premises at 33 River Road in Agawam, Massachusetts. (R 66-67)

There was no testimony as to whether the John Lyman Company warehouse was located at 165 Front Street near Sickles plant in Chicopee, the address set forth in Overt Act numbered 2 in Count One or whether the premises at 33 River Road were the same premises located at 1363 Main Street in Chicopee set forth in Overt Act numbered 2 in Count One.

There was testimony by one Patterson, traffic manager of William Carter Company at Needham Heights, Massachusetts, that the tags (Exhibits 2 and 3) were cutting requirements made by personnel in the Needham Heights plant of William Carter Company and in the usual practice forwarded to the William Carter Company plant in Senatobia, Mississippi; that the usual practice was to have parts of these tags attached to bundles of goods manufactured in Senatobia, Mississippi, which bundles would be placed in large cartons (R 16-21). There was no testimony to show that the tags encompassed by Exhibits 2 and/or 3 identified any garments alleged to have been included in the allegedly missing shipment from Senatobia, Mississippi, to Needham Heights, Massachusetts, and there was no explanation as to what the numbers contained in Exhibits 2

and 3 represented insofar as any specific goods were concerned. (R 14-21)

William James B'Shara, a resident of Springfield, Massachusetts, who had pleaded guilty on April 21, 1964 to an indictment (Appellants' Exhibit A) returned on February 20, 1964 charging him with possessing at Agawam and at Chicopee chattels of a value in excess of $100.00, "That is 150 cartons of Carter cotton underwear goods, which had been stolen from a motor truck and station and depot, while the said chattels were moving as, were a part of, and constituted an interstate shipment of freight and express from Senatobia . . . Mississippi, to Needham . . . Massachusetts" knowing the same to have been stolen, all in violation of 18 United States Code 659, and who had been involved in a Massachusetts state court in 1950 for receiving stolen goods, (R 38) testified that he saw 150 average size cartons in the Agawam garage warehouse belonging to Harry Marrewa on October 31, 1963 and that when a truckman was unloading these cartons from a truck in Chicopee on the same day one of the cartons fell and broke and the contents fell out and he found "baby underwear" in one of the cartons (R 50). There is no testimony by him that the goods were Carter goods or that they were stolen goods or that the cartons had any markings on them. He never saw any of the goods after October 31, 1963 (R 111).

B'Shara, the only witness who identified the appellants or either of them, or who even mentioned appellants' names during the entire trial testified that on the morning of September 28, 1963 while at home in Springfield he received a telephone call from appellant Carranza and that thereafter at about 10:45 A.M. to 11:00 A.M. he met Carranza, whom he identified at the trial, and another fellow named Johnny, whom he identified as appellant Pugliano, at a place in West Springfield; that Carranza asked him if he

could locate a warehouse for him (R 40); that he told Carranza that he had one in Agawam for him to look at; that they went to a garage in Agawam in Pugliano's car where appellants got out of the car and looked through the window of the garage (R. 41); that they rode in Pugliano's car to Thompsonville, Connecticut, where B'Shara had a conversation with Marrewa, as a result of which they returned to Marrewa's house on Reed Street, Agawam, at 2:00 P.M. (R 41); that B'Shara and appellant Pugliano went into Marrewa's house and Pugliano was introduced to Marrewa as "Demers" by B'Shara; that appellant Pugliano told Marrewa that he wanted the garage to store bankrupt merchandise and that he rented the garage for $125.00 per month in the name of "Demers", and signed a paper relative to public and other liability at Marrewa's request (R 43-45).

They then returned to a variety store at the hired premises and picked up the key to the garage which B'Shara testified he gave to appellant Carranza (R 45) after which appellants drove him back to his car where it was parked (R 46). He further stated that about two and one-half or three weeks later B'Shara received a telephone call from appellant Carranza who said he would have the next month's rent for him any time he was ready for it; that he informed Carranza that he would have to give up the garage because Marrewa said he had a chance to rent it to a body shop on a three year lease, three year option; that Carranza said "I've got merchandise in there now. Can't you find me another warehouse." (R 46); that on the following Monday or Tuesday B'Shara went to Chicopee and hired a place at John Lyman and Company and then went and hired a truckman named Leo Blair to move the goods; that that evening Carranza called him on the telephone and was told by B'Shara what he had done; that the next morning B'Shara went to the Agawam warehouse where he got the

key to the premises from Carranza, had the truckman open the warehouse door and B'Shara, the truckman and four others moved the goods to the warehouse in Chicopee (R 49-51). B'Shara never saw the goods again. A week later, he testified, he was paid for the truckman and for the rent of the Chicopee warehouse and appellant Carranza told him that he would be well compensated if they sold the merchandise. In December B'Shara received money from Carranza and paid the rent for the month of December.

About three weeks later, he talked with appellants at a hospital in Springfield and Carranza told him the F.B.I. had picked up the driver who took the stuff down to New York —a man named Suse (R 55) and said, if B'Shara remembers correctly, "If you should get picked up by the F.B.I. don't get too panicky." (R 56) After B'Shara was indicted appellants are alleged to have told him that they were sorry and that he and his attorney should be careful as there were a lot of big people involved in this merchandise. (R 57)

Harry Marrewa, owner of a garage on River Street, Agawam, failed to identify appellant Pugliano as Demers and did not identify appellant Carranza or Pugliano as a person or persons who accompanied B'Shara on September 28, 1963 to his home.

On cross-examination of B'Shara it was brought out that he had given a statement to Agents Brady and Sullivan of the FBI on December 19, 1963 (R 79) in which he failed to mention the name of either appellant but stated only that a person named Demers asked him to hire the garage or was present with him when he hired it (R 81-82) (R 101-102).

It was also brought out that B'Shara had had his deposition taken under oath with a stenographer present who took it down in the presence of the prosecuting attorney, Agent Brady of the FBI and B'Shara's counsel, William

J. Foley, (R 85) in which his testimony of the events which allegedly transpired on September 28, 1963 differed widely from his testimony on the stand (R 85-97) (R 104-107).

At no time did B'Shara testify that he knew the goods in the warehouse were stolen or that either of the appellants at any time stated or even hinted that they were stolen or that they had ever been in interstate commerce or where they came from.

A witness Albert Bilotte, from the New York area, testified that on December 6, 1963, at 8:30 P.M. at Second Avenue and 38th Street, New York City, he took over an Avis truck with Massachusetts registration which he later ascertained contained "Carter goods, Carter underwear, Carter pants", in 149 cartons of three to five feet. (R 120-121) which cartons he loaded into two other trucks and distributed them to three private homes, two in Jersey and another in New York. The only home identified was in North Bergen, New Jersey. (R 123)

The jury retired to deliberate this cause on January 7, 1965, at 10:55 a.m. At 4:20 p.m., the jury reported that it was unable to agree. The trial court then issued a so-called "blockbuster" instruction by reading from the case of *Commonwealth* v. *Tuey,* 62 Mass. 1.

The trial court determined that a third count in the indictment should be dismissed for a lack of evidence. In the course of a bench conference, the trial judge remarked to the prosecutor who appeared to be disposed to complain about losing the third count: "You are not going to complain about that? What do you care about a third count, there is enough evidence on the first two counts to hang a king." The defendants, sitting outside the bar enclosure, heard this remark; several of the jurors laughed.

Reasons for Granting the Writ

Since it appears that the district court was of the opinion that the same facts necessary to support the substantive Count would support the conspiracy Count, this Court's attention will be called first to the evidence as it applies to Count Two.

I. The Substantive Count

Count Two alleges that from on or about the thirtieth day of September, 1963 to on or about the sixth day of December, 1963, at Agawam and at Chicopee, the appellants wilfully and knowingly had in their possession 150 cartons of Carter underwear goods which had been stolen from Akers Motor Lines, Inc. depot, Boston, Massachusetts, while moving as an interstate shipment of freight and express.

The statute, Title 18 United States Code, section 659, makes it an offense to receive or have in one's possession any goods which have been stolen from a depot, while moving as or being a part of or constituting an interstate shipment of freight or express.

It was, therefore, incumbent upon the Government to prove beyond a reasonable doubt:

> (1) That the goods in question were stolen from the Akers Motor Lines, Inc. depot in South Boston, Massachusetts, as alleged in said Count.
>
> *U. S.* v. *Manuszak,* 234 F2d 421, CCA, 3, 1956
>
> (2) That appellants had possession of said goods at Agawam and at Chicopee, Massachusetts; and
>
> (3) That appellants at the time they had possession of said goods knew they were stolen.

A. *The evidence was insufficient to support a finding that 150 cartons of Carter underwear goods were stolen from Akers Motor Lines, Inc. depot, Boston, Massachusetts.*

There was no direct evidence that the goods in question ever arrived at the Akers Motor Lines, Inc. depot in South Boston. No one testified that he saw the trailer upon which this shipment was supposed to have been shipped arrive at the depot on September 28 or 29, 1963. No one testified that he saw the trailer on the lot at any time. No driver of any truck testified that he at any time brought this shipment to the depot. No one testified that he received the shipment on behalf of Akers or any papers covering this shipment on behalf of Akers.

A bill of lading (Exhibit 1) evidences that the goods were shipped from Senatobia, Mississippi, on September 25, 1963. This exhibit was presented in evidence by one Patterson, traffic manager of William Carter Company at Needham Heights, Massachusetts. It was apparently received by mail by the consignee (R 15). The goods covered by this bill of lading were never delivered to the consignee.

The terminal manager for Akers Motor Lines, Inc. depot in South Boston, one Martel, presented in evidence a copy of a freight bill (Exhibit 5) which he apparently assumed he saw on September 29, 1963, but actually remembers seeing on October 1, 1963 when it was first brought to his attention that a certain trailer in which the 150 cartons of Carter goods was supposed to have been shipped was not at that time on the Akers depot lot in South Boston.

An attempt was made to prove that the trailer actually arrived on the lot on the night of September 28, 1963, by showing that it was the regular practice for drivers to leave freight bills in a bunkroom when they arrive with a

trailer and pick up a southbound trailer with an envelope which indicates which trailer they take southbound (R 28). No witness was called to testify that he delivered this trailer to the Akers depot or that he delivered the freight bill in question, or that he picked up papers at the bunkhouse and another trailer for a southbound run on that night. A watchman at the depot who went to work at midnight was unable to state that he picked up the particular freight bill at the bunkhouse or that he saw the trailer at the depot.

Even if it be found that the freight bill was left in the bunkhouse on the night in question, it is far from proof beyond a reasonable doubt that the trailer also arrived. Even the Court appeared confused as to the testimony (R 33-34). At most the evidence was conjectural and insufficient as a basis for a finding that the trailer was actually on the depot lot and stolen therefrom.

Of course, if the trailer with the goods therein never arrived at the Akers depot, or if it actually did arrive there, but the goods had been stolen elsewhere before the trailer arrived at the depot, appellants should have been acquitted on both Counts.

United States v. *Manuszak,* supra.

The fact that a trailer bearing the notation "Georgia Express" was seen in Worcester, Massachusetts at 4:30 A.M. on September 29, 1963 and was examined by a police investigator on October 1, 1963 does not aid the Government's case. Neither witness who saw the trailer in Worcester testified as to whether there were any cartons in the truck at the time or whether the seal on it was broken. There was nothing about it which showed that it had at anytime been on the Akers depot lot. It does not even appear affirmatively on the bill of lading that the 150 cartons of Carter goods were ever sent on this trailer from

Mississippi. The freight bill which contains the notation "GHE 277" is at best equivocal since there is no evidence that it was ever paid or approved by William Carter Company.

It is submitted that the evidence did not prove and was not such as would permit the jury to infer beyond a reasonable doubt that the 150 cartons of Carter underwear goods referred to in the indictment ever actually arrived at the Akers Motor Lines, Inc. depot in South Boston or that the goods in question were stolen from said depot. The Court therefore erred in denying appellants' motions for acquittal on Count Two.

B. *There was no evidence sufficient to prove beyond a reasonable doubt that appellants at Agawam and at Chicopee possessed 150 cartons of Carter underwear goods, knowing them to have been stolen.*

There was submitted in evidence but one carton of Carter goods which were in any manner identified as having been shipped from Senatobia, Mississippi, consigned to William Carter Company, Needham Heights, Massachusetts.

According to the testimony of FBI agent Kirtley, this carton was found by him in East Rutherford, New Jersey, on December 11, 1963 at a place directly behind 320 Patterson Park Road. While that carton contained a sticker label containing the notation "C 2912" which was allegedly a label contained on one of the 150 cartons shipped from Senatobia, Mississippi, it also, in large print on the side thereof, contained a notation that it came from William Carter Company, Needham Heights, Massachusetts. How that carton arrived at East Rutherford, New Jersey is left entirely to conjecture. A witness, Bilotti, who failed to identify either appellant, testified that on December 6, 1963 he received 149 cartons of Carter goods from a truck

with a Massachusetts registration in New York City and left them in three drops—"two in Jersey and another one in New York. Private homes". (R 123) One of the homes was apparently in North Bergen, New Jersey, but there was no evidence that the other was in East Rutherford, New Jersey. He was not asked to and he did not identify the carton in evidence as one of the cartons he picked up in New York and left in New Jersey.

It was equally as likely that, if the carton were in the trailer, it was taken from it on the way north from Mississippi as the trailer passed through New Jersey as that it was taken from the Akers depot. There is no evidence that it was ever in the Agawam garage or the Chicopee warehouse. B'Shara never identified it as having been in either place, nor did anyone else. It might well have been stolen at some time from the Needham Heights plant.

It should not have been admitted in evidence over appellants' objection since it was never connected up to either appellant by any evidence.

The evidence that appellants hired a garage or warehouse on September 28, 1963 is purely circumstantial and insufficient.

The only evidence submitted as to why appellants hired the warehouse or garage, if they did so, was an alleged statement by Demers (alleged to be Pugliano) to witness Marrewa, "Sometimes I buy out bankrupt merchandise" (R 42), and the testimony of B'Shara that on October 31, 1963 there were 150 cartons in the Agawam warehouse, one of which broke when being unloaded at Chicopee and he noticed "baby underwear" in one of the cartons. (R 50). There is no evidence that the "baby underwear" bore the Carter label or that any of the cartons bore a Carter label or were in any manner related to the cartons allegedly contained in the interstate shipment.

The fact that "tags" identified by the witness Patter-

son as Carter order tags were found in a garage at 33 River Road, Agawam, an address not otherwise identified as 1363 Main Street, Agawam, where according to Count One, Overt Act 1, the goods were alleged to have been stored, and at the John Lyman warehouse in Chicopee, an address never identified as that of 165 Front Street, Chicopee, mentioned in Count One, Overt Act 2, certainly was inconclusive. By that date, according to the Government's evidence, any goods which the appellants might have had in the Agawam garage, if it were the place where the tags were found, had been moved out on October 31, 1963 and the garage had been hired by a new tenant and used as a body shop (R 65) and at least by December 6, 1963 the Chicopee warehouse where the goods allegedly had been stored had been given up and the goods shipped to New York, according to the allegations of the indictment. (Count Two, Overt Act 4)

Additionally, none of the tags, allegedly found by the FBI Agents (Exhibits 2 and 3) were shown to have been attached to any of the goods included in the shipment from Senatobia, Mississippi, on September 25, 1963. Although the witness Moore explained markings on a tag found in a truck in Springfield, there is no evidence that the tag he examined was similar to the tags found in Agawam and at Chicopee. These tags (Exhibits 2 and 3) should not have been admitted in evidence against these appellants.

C. *There is no evidence that appellants knew that any goods in their possession at Agawam and/or at Chicopee were stolen.*

It is not charged and there is no evidence to prove in the slightest degree that appellants took part in the theft of any goods. Thus, if there were evidence that any goods possessed by the appellants in Agawam and/or Chicopee

were stolen, the Government would have the burden of proving appellants knew said goods were stolen.

While it may be true that unexplained possession of recently stolen goods permits a jury to infer that the possession is guilty possession and that the defendant knew that the goods were stolen, *United States* v. *Allegrucci,* 258 F(2) 70, CCA 3, 1958, it is submitted that in the instant case, even if we assume that the goods were stolen from Akers depot in Boston and that they came into the possession of the appellants at Agawam, there is no evidence that they came into the possession of the appellants until about two and one half or three weeks after September 28, 1963, which would not be sufficiently recent possession to permit the inference. Also there is no evidence of attempting to hide the goods from scrutiny except perhaps the presence of some Bon Ami on the windows two and one half to three weeks after the alleged theft. They were moved from Agawam to Chicopee on a Saturday morning (R 49) with the truckman and four others helping B'Shara (R 100). There is no evidence of any attempt to sell the goods at a cheap price by the appellants. None of the usual evidence of knowledge of the stolen character of goods was present to support an inference of guilty knowledge.

It is also remarkable that B'Shara, who had already pleaded guilty to receiving goods stolen from an interstate shipment and who gave every evidence while on the stand of wanting to co-operate with the Government and who identified both appellants as persons with whom he had dealings with regard to hiring the Agawam garage and the Chicopee warehouse and with whom he later had other conversations, was never asked if he knew these goods were stolen or if he ever discussed with the appellants or either of them the origin of the goods or if they ever told him anything that might evidence that they had knowledge that the good were stolen, and he never gave any

such information to the jury. Certainly if such evidence were existent Mr. B'Shara would have been asked about it and would have stated it on the stand.

Of course, their alleged association with B'Shara might create suspicion, but it is not evidence of sufficient weight to convict.

United States v. *Carangella,* 198 F(2) 3, (CCA 7) (1952)

The lack of any evidence of guilty knowledge on the part of either appellant left the Government lacking a prima facie case on which they were entitled to go to the jury.

In summary the Government's case is based on purely circumstantial evidence insofar as appellants are concerned. In order to justify a conviction or crime on circumstantial evidence it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt. *United States* v. *Russo,* 123 F(2) 420, CCA 3, 1941. No such directly proven circumstances are present here. Compare *United States* v. *Ross,* 92 U.S. 281.

II. The Conspiracy Count

A. *Count One Should Be Dismissed.*

Count One charges that from on or about September 28, 1963 to on or about December 9, 1963, at Springfield, Massachusetts and elsewhere appellants, together with William James B'Shara and Robert Joseph Suse did conspire together and with divers other persons whose names were unknown to the Grand Jury to commit an offense against the United States; that is, to receive and have in their possession goods and chattels of a value in excess of $5,000, that is, 150 cartons of William Carter Company cotton underwear goods and to transport said goods from

Chicopee, Massachusetts to New York City, New York, "knowing the same to have been stolen, and the said chattels and goods having been stolen from the Akers Motor Lines, Inc. depot at Boston, Massachusetts while the said chattels were moving as, were a part of, and constituted an interstate shipment of freight and express" from Senatobia, Mississippi to Needham Heights, Massachusetts. (R 5)

It is to be noted that said count fails to allege that the appellants knew that the goods in question had been stolen from the Akers Motor Lines, Inc. depot at Boston, Massachusetts. Knowledge, not only that the goods were stolen, but also that the goods were stolen *from a depot* while constituting an interstate shipment of freight or express must be alleged and proved. (Italics added)

United States v. *Sherman,* 171 F(2) 619, 623

It is submitted that the language contained in this count following the word "stolen" does not constitute an object of the participle "knowing", but rather a mere statement that the goods had been stolen from the Akers depot while moving in interstate commerce.

Although this matter was not brought to the attention of the district court, it was properly raised in the Court of Appeals.

Federal Rules of Civil Procedure, Rule 12(b)(2); Rule 54(a)(1), 18 U.S.C., *United States* v. *Manuszak* 234 F(2) 421 CCA 3, 1956; *Johnson* v. *U. S.,* 206 F(2) 806, 808, CCA 9, 1953.

B. *There Was No Evidence Presented Which Was Sufficient To Sustain The Allegations Of Count One.*

The government had the burden of proving beyond a reasonable doubt on this count, not only that appellants

or either of them knew that the goods which they possessed in Agawam and at Chicopee were stolen, but also that appellants knew that the goods had been stolen from an interstate shipment of freight and express,

United States v. *Sherman,* 171 F(2) 619, CCA 2, 1948, cert den. 337 U.S. 931
United States v. *Crimmins,* 123 F(2) 271, CCA 2, 1941
United States v. *Bollenbach,* 147 F(2) 199, CCA 2, 1944

and additionally that said goods were stolen from the Akers Motor Lines, Inc. depot in Boston. *United States* v. *Sherman,* supra.

There is no evidence to support such conclusions.

The evidence hereinbefore referred to in detail did not show that the goods which the appellants are alleged to have had in their possession at Agawam and at Chicopee were stolen or that they were stolen from the Akers depot in Boston.

At most the evidence was that on September 28, 1963 B'Shara and Pugliano arranged for the hiring of a garage belonging to Marrewa to use for storing bankrupt merchandise (R 42). There is no evidence as to when any goods were placed in the garage by appellants or by any one connected with them except that some two and one-half or three weeks later Marrewa saw there was something inside which he could not describe or identify (R 65) and the testimony of B'Shara that about three weeks after the rental Carranza told him "I've got some merchandise there now" (R 46) which merchandise he did not describe (R 47).

At best, the evidence produced on the stand by the government was that on October 31, 1963, more than one month after the Georgia Highway Express Truck was allegedly found to be missing in Boston, B'Shara counted

150 cartons which were not described as containing Carter labels or insignia thereon, one of which cartons subsequently broke open at Chicopee revealing to B'Shara a bundle of children's underwear, not otherwise described.

If it be assumed that Exhibit 4 was one of the cartons in the Agawam garage, and it is submitted that there is no evidence that it was, that carton bore a legend "From William Carter Company, Needham Heights, Mass." Such a marking would not tend to put appellants on notice that it was stolen from an interstate shipment of freight and express at Akers' depot in Boston or elsewhere. To the contrary it would tend to rebut any inference of such knowledge on the part of the appellants.

If evidence sufficient to cast suspicion upon a defendant charged with conspiracy is not enough to sustain a conviction, *Glover* v. *United States,* 306 F(2) 594, CCA 10, 1962 the evidence here is completely insufficient and incompetent.

While a conspiracy count need not be proved by direct evidence, *United States* v. *Zuideveld,* 316 F(2) 873, CCA 7, 1963 there must be evidence of a substantial nature to support an inference of its existence and of the participation therein by the accused. *Reiss* v. *United States,* 324 F(2) 680, 685 CCA 1, 1963. It must afford the jury with substantial evidence of a plan, a meeting of the minds, to perpetrate an illegal act.

In this regard, it is to be noted that the government had on the stand a witness, B'Shara, who had pleaded guilty to having received and possessed at Agawam and at Chicopee, 150 cartons of Carter underwear goods. He was a most willing witness. Without any hesitation or reluctance he identified both appellants—Carranza as a person he said he had known for one year and Pugliano whom he said he first met as Johnny Demers on September 28, 1963. He freely testified as to riding from West Springfield to Aga-

wam, to Thompsonville, Connecticut and back to Agawam and West Springfield with them and of meeting them on several later occasions and he testified to conversations he allegedly had with both appellants. Yet B'Shara was never asked and never testified to any conversation about any plan to receive and possess any Carter underwear goods, where they came from, when they were to arrive or when they did, if ever, arrive in Agawam, how they were to get there, what was going to be done with them, whether or not they had been stolen, whose goods they were, or any other matters which a government witness who was an alleged co-conspirator and was testifying freely on the advice of his attorney would be expected to testify to on a conspiracy count.

The jury was left to infer from an alleged possession of some goods by the appellants, which possession was not found to have come into being until some two and one-half to three weeks after an alleged larceny in Boston one hundred miles away, that there had been a conspiracy to possess specific goods, the possession of which by the appellants was, at most, conjectural, knowing that the goods had been stolen from Akers Motor Lines, Inc. depot in Boston.

The government failed to prove by any evidence that the goods stored in the Agawam Garage and in the Chicopee warehouse were the Carter goods allegedly stolen from Akers' depot in Boston or except by pure conjecture and surmise that any goods were stolen from Akers' depot in Boston as alleged.

Additionally, they failed to present any evidence to prove Overt Acts numbered "2", "3" and "4". The Court instructed the jury to disregard overt act numbered "4" for lack of evidence.

It is submitted that there was no evidence to show that the John Lyman Company warehouse was situated at "165

Front Street near the Sickles Plant in Chicopee", Massachusetts as set forth in overt act numbered "2" and that overt act is devoid of any proof.

There is, therefore, no evidence to support overt act numbered "3".

While there is evidence that John Demers signed a paper made out by Marrewa relative to liability for injuries suffered by anyone at 1363 Main Street, Agawam (Ex. 5), Agent Brady described the Marrewa garage as at 33 River Road (R 66) and no one, even Marrewa himself, the owner thereof, told where his garage was located.

For the above stated reasons the motion of the appellants for Judgements of Acquittal on Count One should have been allowed.

III. It Was Error to Give the Jury a "Dynamite" Instruction

Some five hours after the jury had commenced its deliberations, the foreman (R. 147) indicated that they had been unable to agree. The trial court then read to the jury a portion of the opinion of *Commonwealth* v. *Tuey*, 62 Mass. 1, which was approved by this Court in *Allen* v. *United States*, 164 U.S. 492, 501. We believe that the use of this instruction, admittedly approved in many jurisdictions, constitutes an unwarranted intrusion upon the delicate function of jury deliberation, and should in the light of modern jurisprudence be abolished, from federal courts if not in all courts.

There have been in recent times signs of mounting discontent with what is variously known as the "shotgun", (*State* v. *Nelson*, 63 N. M. 428, 321 P.2d 202), "third-degree" (*Leech* v. *People*, 112 Colo. 120, 146 P.2d 346), and "dynamite" instruction. The Supreme Court of Arizona has laid in an appropriate grave the *Allen* instruction:

> "This instruction has been before us four times. When and wherever its use is called into question it must stand or fall upon the particular circumstances of each particular case. It has given, and we believe each use will give us, harrassment and distress in the administration of justice. * * * We are convinced that the evils outweigh the benefits, and decree that its use shall no longer be tolerated by this court." *State* v. *Thomas,* 86 Ariz. 161, 342 P.2d 197.

Similarly, the Court of Appeals for the Fifth Circuit, reversing a conviction in *Green* v. *United States,* 309 F.2d 852, because of a dynamite instruction which suggested that the minority jurors ought to "distrust" their own judgment, said:

> "There is no justification whatever for its coercive use. The jury system rests in good part on the assumption that the jurors should deliberate patiently and long, if necessary, and arrive at a verdict—if, but only if, they can do so conscientiously. It is improper for the court to interfere with the jury by pressuring a minority of the jurors to sacrifice their conscientious scruples for the sake of reaching agreement." 309 F.2d, 854.

Despite the apparently polite niceties of verbiage conceived in *Tuey* and endorsed by *Allen,* suggesting only that the minority caucus listen to the majority "with a disposition to be convinced," there can be no doubt in logic but what language like this from the bench carries to the laymen in the throes of deliberations the clear implication that reasonable doubt entertained by less than half of the jurors is probably an unreasonable doubt. The only possible justification for the continued exploitation of this method of

exploding potential deadlocks is that a higher percentage of verdicts will be produced than if it is eschewed. But hammering out verdicts in close cases is not a legitimate objective in the law, for that most precious bulwark of liberty—the requirement of proof beyond a reasonable doubt—is in the process so seriously undermined as to effectively remove it from the system. If one juror entertains an honest and reasonable doubt for any reason, a defendant is *entitled* to a mistrial.

The text of the *Tuey* instruction bottoms its justification upon the notion that a hung jury is a waste because no better jury can in the future be assembled to perform the same task. While the logic in this position may be attractive, practice shows that where a case ending in jury disagreement is tried again, the disagreement seldom recurs.

We think that indeed the only fair label for the instruction is "coercive"; coercion in every form has ever been repugnant to our system of justice, and should be rooted out here, in this most critical stage of trial.

IV. It Was Error to Give the Jury a "Dynamite" Instruction Without Including that Portion of Said Instruction Which States that the Government Has the Burden of Proof

As is indicated in the opinion of the court below, the trial court failed to include in his *Tuey* instruction that portion relating to the burden of proof. The author of the Court of Appeals has posed the question as to whether or not this should be considered error, but concludes that it is not "plain error" and that in the absence of an objection on the record no reversal is required.

The Court of Appeals acknowledged that petitioner's counsel claimed, in his motion for new trial, that an ob-

jection had been timely made but was missed by the stenographer (see n. 4, opinion below). It then ruled that this procedural default was binding upon the defendants (petitioners) and refused to consider on its merits the significance of the trial court's omission in the challenged instruction.

Petitioners in their petition for rehearing asked to be allowed to return to the District Court for correction of the record, so that it might conform to the truth. The denial of this request was, we believe, error. It is one thing to penalize litigants for an actual omission on the part of their counsel, however powerless they may have been to realize or prevent the forfeiture when it occurred. But it was quite another, where counsel *has* taken proper steps and these are simply through inadvertence omitted from the record. There is always power in a court to correct a record in order that it conform to the truth. The Court of Appeals should have permitted that power to be exercised by the trial court, in order that these petitioners not be wrongly deprived of their rights.

V. The Trial Court Should Have Granted a New Trial Because the Jury Heard the Remark by Him "There Is Enough Evidence On the First Two Counts to Hang a King."

District Judge Ford, upon complaint by defense counsel during a hearing on motion for new trial (R. 162) that the jury had heard and was probably prejudiced by his *sotto voce* remark to counsel that the evidence on counts one and two was sufficient to "hang a king" filed a statement setting forth his reasons for believing that no juror had actually heard what was said. (see appendix A) He ruled in effect, and no doubt believed, that because of his position on the bench at the time he spoke and the voice

level he thought he used the remark could not have been overheard.

We respectfully suggest that in view of counsel's assertion that both petitioners had heard clearly (in this jurisdiction defendants are seated outside the bar enclosure during the trial, on the side of the court nearest the jury) and upon counsel's recollection that the jurors or some of them had laughed aloud as the remark was made, Judge Ford ought not to have relied upon his own estimate of audibility. The best evidence, and perhaps the only competent evidence, of what an individual has heard is the testimony of the listener. Even if only because aural acuity varies widely between human beings, further investigation of this question was warranted. The jurors themselves should have been queried.

It is noted that Judge Ford has *not* based his disposition of this question upon harmlessness, contending that such a comment might have fallen within the license of federal trial judges to give their personal views to a jury. Accordingly, we do not deal with the question of whether such license could ever be stretched to permit opinions of this nature. We presume that a new trial was denied solely because the Judge sincerely believed that no damage had been done.

We are painfully aware that it would be wholly improper for counsel to introduce new matter into the record at this stage of appellate review. But counterbalancing our appreciation of the need for rigid procedural regulations in legal cases is a corollary understanding that the law benefits not at all when judicial decisions, however wisely reasoned, are based upon untrue facts. We therefore assert that counsel now possess affidavits showing unequivocally that jurors *did* hear, and discuss in the jury-room the remark in question. (These were not available when the petition for rehearing was filed.)

We believe that upon these grounds, even if reversal is not otherwise required upon the questions presented, the case ought to be remanded to the District Court for a determination in that Court, in the light of all the available evidence, whether the Court's aside tainted the jury which convicted these petitioners on evidence which, as the decision in the Court of Appeals makes plain, fell far short of being sufficient to "hang a king".

Conclusion

For the reasons stated above, petitioner respectfully suggests that a writ of certiorari ought to issue to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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Of Counsel:
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Appendix A

STATEMENT OF JUDGE FRANCIS J. W. FORD IN THE CASE OF THE UNITED STATES v. FRANK ANTHONY PUGLIANO AND WILLIAM CARRANZA, CRIMINAL NO. 64-190-F, FILED IN CLERK'S OFFICE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, MAY 24, 1965:

With respect to the remark attributed to me by appellants' counsel in his addendum to the record on appeal, there is no question that I made these statements to the United States Assistant Attorney: "You are not going to complain about that? What do you care about a third count, there is enough evidence in on the first two counts to hang a king."

This remark was not made within the hearing of the jury. In accordance with my established custom, before I informed the District Attorney of my intention with respect to the third count of the indictment, I removed myself from beside the jury to a place between the middle of the bench and the far side for the purpose of being out of the hearing of the jury, as I knew a discussion was about to take place.

There was a discussion with respect to my action lasting about five minutes, in which certain aspects of the evidence were gone into. At no time did I raise my voice. I employed the same tone of voice as was employed in numerous other discussions that took place at the bench during the trial.

At no time did I state to counsel for the defendants that I would take care of the matter later. This is a misstatement. At no time did I have the slightest doubt that the jury did not hear what I had said.

(s) FRANCIS J. W. FORD
United States District Court Judge

Appendix B

Thereafter, on July 23, 1965, the following opinion was filed in these two cases:

United States Court of Appeals
For the First Circuit

No. 6500.

FRANK ANTHONY PUGLIANO,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE;

No. 6501.

WILLIAM CARRANZA,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge,* LUMBARD*, *Chief Judge,* and LEWIS*, *Circuit Judge.*

Philip T. Jones for appellants.

William B. Duffy, Jr., Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.

July 23, 1965.

ALDRICH, *Chief Judge.* The defendants were found guilty

*Sitting by designation.

by a jury on two counts of an indictment. Count 1 charged conspiracy to receive, possess and transport in interstate commerce goods which were known to be stolen, and which had been stolen when moving in interstate commerce. Count 2 charged the substantive offense of possession of goods stolen in interstate commerce knowing the same to have been stolen. Following the verdict the defendants received single sentences on the whole indictment, and they appeal.

The defendants, not entirely without cause, attack the validity of Count 1 of the indictment in that it fails to allege that they knew that the goods had been, or were to be, stolen in interstate commerce. With respect to the conspiracy to transport in interstate commerce the charge was adequate. 18 U.S.C. §2314; *Gable* v. *United States,* 7 Cir., 1936, 84 F.2d 929. The substantive crime of receiving or possessing goods that have been stolen in interstate commerce requires knowledge only of the fact, and not the place, of theft. 18 U.S.C. §659; *United States* v. *Sherman,* 2 Cir., 1948, 171 F.2d 619, *cert. den.* 337 U.S. 931. However, the reasoning in *Sherman,* coupled with that of prior cases in that circuit on which the court relied, indicates that conspiracy to receive requires proof of knowledge of the interstate character of the theft.

We need not decide, however, whether we would follow *Sherman* in this regard unless there was error as to Count 2, since defendants received one sentence on the entire indictment. *Sinclair* v. *United States,* 1929, 279 U.S. 263; *cf. United States* v. *Gainey,* 1965, 380 U.S. 63. With respect to that count we have examined the evidence and find it substantively sufficient. It is true that perhaps more than the usual number of connecting inferences needed to be drawn, but we cannot say that the jury could not have properly done so. Nor do we find merit in those of defendants' other exceptions that were adequately preserved.

One matter we do comment upon. When, after several hours, the jury indicated the possibility of a disagreement, the court read them a portion of the *Allen*,[1] or, more exactly, of what in this jurisdiction is known as the *Tuey*[2] supplemental charge concerning the jury's duty to endeavor to agree. It omitted the part dealing with the burden of proof.[3] Counsel expressed no objection upon the record.[4] If it was error to make this omission, which we do not decide, we are satisfied that it was not "plain error," and cannot now be reviewed. *Dichner* v. *United States*, 1 Cir., —— F.2d —— (7/15/65).

The writer of this opinion will, however, append a personal observation. The so-called *Allen* charge, while not uniformly endorsed, *cf. Green* v. *United States*, 5 Cir., 1962, 309 F.2d 852, is commonly accepted, without discussion, on the ground that it was approved by the Supreme Court. See, *e.g., Moore* v. *United States*, D.C.Cir., 1965, 345 F.2d 97. The Court's opinion contains only a paraphrase of the charge it reviewed, stating that the charge itself was "taken literally" from *Tuey*. 164 U.S. at 501. The present question did not arise, and no one since that time appears to have noted that, as the record discloses, the district court had included from *Tuey*, at the corresponding place in its supplement charge, the following.

> "In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is upon the government."

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[1] *Allen* v. *United States*, 1896, 164 U.S. 492.

[2] *Commonwealth* v. *Tuey*, 1851, 8 Cush. (62 Mass.) 1.

[3] See 8 Cush., *supra*, at 2.

[4] Defendant asserted in connection with a motion for new trial that at the bench, immediately after this charge was given, he called the court's attention to the omission he now objects to. He initially saved no rights, however, and for all that appears may have withdrawn any objection. A motion for new trial is too late to save an objection that could have been taken earlier.

At an appropriate time it might well be asked whether this language may have been, and should be, regarded an integral part of the *Allen* charge, the leaven making it palatable.

Affirmed.

On the same day, July 23, 1965, the following judgment was entered in each of these two cases:

JUDGMENT

July 23, 1965.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(s) ROGER A. STINCHFIELD
Clerk.